Intersweet, Inc. *and* International Ladies' Garment Workers' Union Local 76, AFL–CIO. Case 13–CA–31786

April 22, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On March 28, 1995, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions. The Respondent filed a reply brief to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

As part of the remedy, the judge imposed a *Gissel*[3] bargaining order. We believe that the judge has fully and correctly articulated the reasons why such an order is appropriate in this case.

The Respondent contends that changed conditions since the time of the events at issue render a bargaining order inappropriate. We disagree. Our well-established rule is that the validity of a bargaining order depends on an evaluation of the circumstances as of the time the unfair labor practices were committed. *Yerger Trucking*, 307 NLRB 567 (1992). The Board adheres to this position largely on the grounds that consideration of changed circumstances after the unfair labor practices were committed would reward, rather than deter, an employer who engaged in unlawful conduct during an organizational campaign. *Highland Plastics*, 256 NLRB 146, 147 (1981). This rationale is particularly applicable here, where the Respondent reacted to the first hint of a union campaign by terminating the entire bargaining unit and failing to recall most of the union supporters. In addition, regardless of changed circumstances, a bargaining order in reality has a minimal effect on employee free choice, because employees are free to reject continued union representation after a reasonable period of time has elapsed even if a bargaining order has been imposed. See *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1951), enfd. 192 F.2d 740, 742 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952). However, even assuming that changed conditions were relevant, the bargaining order would still be appropriate here.

The Respondent cites three factors in support of its contention: the death of the owner, Julius Meerbaum; the passage of time; and change in the composition of the bargaining unit. The judge pointed out that, despite Julius Meerbaum's death, Jose Diaz, David Sabin, and John Meerbaum, all of whom assisted Julius Meerbaum in ridding the Respondent's work force of employees who had signed authorization cards, were still part of the Respondent's management. The Respondent has not disputed that these three individuals are still part of its management. The judge also found that there was no reason to believe that Julius Meerbaum's role in the Respondent's unfair labor practices was even known to many of the employees, whose only contacts in connection with those practices were with the still-incumbent members of management who executed them. Thus, this case is distinguishable from cases such as *Impact Industries*, 293 NLRB 794 (1989), where the Board, on remand from the United States Court of Appeals for the Seventh Circuit, found a bargaining order no longer warranted because, among other things, the Respondent's original co-owners had died and the company was being managed by trustees. We also note that in *Montgomery Ward & Co.*, 307 NLRB 764 (1992), the Board affirmed a judge's decision, also on remand from the Seventh Circuit, denying a bargaining order. In that case, the judge found that only 1 of the 13 supervisors involved in the unlawful conduct was currently employed as a supervisor at the Respondent's facility.

As to the passage of time, the critical actions in this case occurred early in 1993. In *Montgomery Ward*, by contrast, almost 8 years had passed between the time of the unfair labor practices and the imposition of a bargaining order. Similarly, in *Impact Industries* there had been a lapse of 7 years. The passage of time in this case, to a greater extent than the passage of time in either of those cases, can be attributed to the normal course of litigation, and thus should not result in a benefit to the Respondent, which is the wrongdoer.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Respondent's allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in her credibility resolutions, analysis, or discussion of the evidence.

[2] The Respondent contends that the discriminatees are not entitled to backpay or reinstatement because they had no legal right to work in the United States. We leave to the compliance stage of these proceedings a determination as to backpay and reinstatement in accordance with the Board's decision in *A.P.R.A. Fuel Buyers Group, Inc.*, 320 NLRB 408 (1995).

The administrative law judge's notice has been conformed to his recommended Order.

[3] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Finally, the Respondent relies on asserted changes in the composition of the bargaining unit. In this regard, the Respondent has submitted a motion to reopen the record or alternative motion to supplement the record. The General Counsel and the Charging Party both filed responses opposing the Respondent's motion. The General Counsel filed a motion to strike portions of the Respondent's brief in support of exceptions. The Respondent filed a response opposing the General Counsel's motion. We deny the Respondent's motion.[4] We shall, however, for purposes of analysis, accept as true the representations made by the Respondent in connection with its motion. Essentially, the Respondent asserts that, as of April 8, 1995, 114 employees worked in jobs encompassed by the relevant bargaining unit and that the Respondent expects this number to reach about 150 during 1995.[5] The Respondent further asserts that only 9 of the 114 employed as of April 8 worked for it before January 26, 1993, and that after the close of the hearing in this matter (in November of 1994), the Respondent had only 59 employees in bargaining unit jobs.

As an initial matter, we note that the judge correctly pointed out that the Respondent cannot rely on the vacancies created by the Respondent's unlawful refusal to recall 18 discriminatees. Were these 18 to be reinstated, 27 of the original 31 bargaining unit employees would apparently be present.[6] Thus, relatively little turnover would have occurred. Rather (again, accepting the Respondent's representations), this would appear to be a case of unit expansion. The record (augmented by the Respondent's representations) indicates that, as a result of the success of a new product, the Respondent has hired many new employees. However, the tasks performed, and machines operated, by these new employees appear to be essentially the same as those performed and operated by the original employees. The record further indicates that the jobs performed by the unit employees are unskilled and require only a few minutes of training. Although the bargaining unit may be considerably larger than it was, its nature has not changed appreciably. This consideration, together with the fact that, assuming reinstatement, 27 of the original 31 unit employees will be present, persuades us that, notwithstanding the Respondent's proffered evidence, a bargaining order is appropriate in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Intersweet, Inc., Skokie, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

MEMBER COHEN, dissenting in part.

I would remand this case for an expedited hearing on the current composition of the bargaining unit. According to the Respondent, there were 114 unit employees as of April 8, 1995, and the unit was expected to grow to about 150 during the remainder of 1995. We do not know the validity of these figures. Assuming the figures to be true and further assuming that the 18 discriminatees are eligible for reinstatement, this would mean that only 27 of 114–150 employees were present when the unlawful actions were committed. In such circumstances, I consider it to be at least arguable that a fair election can be held after traditional remedies are imposed and a reasonable period of time has elapsed.

In sum, without passing on whether a *Gissel* order would be appropriate, I would hold a hearing to ascertain the facts concerning unit composition. Inasmuch as such a hearing would be confined to the question of unit composition, I believe that the hearing would be expeditious and brief.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate you, fail to rehire or recall you, or otherwise discriminate against you, with regard to your hire or tenure of employment or any other term or condition of employment, to discourage membership in International Ladies' Garment Workers' Union Local 76, AFL–CIO, or any other union.

WE WILL NOT tell you that old employees will not be called back because of the Union or because they were in the Union.

[4] We also deny the General Counsel's motion to strike portions of the Respondent's brief in support of exceptions.

[5] The unit included 31 employees at the time of the Respondent's unfair labor practices.

[6] This would include the 18 reinstated employees, plus the 9 that the Respondent asserts were still there as of April 8, 1995.

WE WILL NOT ask you about union activity in a manner constituting interference, restraint, or coercion.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with International Ladies' Garment Workers' Union Local 76, AFL–CIO, as the bargaining agent for the employees in the bargaining unit described below, and embody in a written contract any agreement reached. The appropriate bargaining unit is:

> All full-time and regular part-time production and maintenance employees employed by us at our facility currently located at 7321 Ridgeway Avenue, Skokie, Illinois; but excluding all professional employees, supervisors, office clerical employees, and guards as defined in the Act.

WE WILL offer the following employees immediate and full reinstatement to the positions from which they were terminated on January 26, 1993, or, if any of their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges:

Bonifacia Brito	Evelia Martinez
Manuel Esteban	Sandra Montoya
Hilda Garcia	Serafin Patino
Francisca Gomez	Dolores Perez
Martha Haro	Antonio Rebollar
Carlos Luna	Evelia Reyes
Olga Marin	Joel Soto
Roberto Marquez	Ismael Urias
Ernesto Martinez	Filiberto Varela

WE WILL make these employees, and the employees named below, whole, with interest, for any loss of pay they may have suffered by reason of the discrimination against them:

Isaias Alanius	Sergio Roman
Teresa Cisneros	Rosa Linda Ruiz
Antonia Delgado	Graciela Salgado
Adam Martinez	Flavio Vasquez
Ismael Moran	Antonio Vinces
Fermin Rivera	Bobby L. Watkins

WE WILL remove from our files any reference to the unlawful terminations, and notify the unlawfully terminated employees in writing, in each such employee's primary language, that this has been done and that the unlawful terminations will not be used as a basis for future personnel actions against them.

INTERSWEET, INC.

Richard S. Andrews, Esq., for the General Counsel.
Michael Klupchak. and *Robert M. Klein, Esqs.*, both of Chicago, Illinois, for the Respondent.
Martin P. Barr, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Chicago, Illinois, on July 19–22, October 5–6, and November 21, 1994, pursuant to a charge filed against Respondent Intersweet, Inc., on June 9, 1993, by International Ladies' Garment Workers' Union Local 76, AFL–CIO (the Union), and a complaint issued on August 17, 1993, and amended on October 6, 1994. The complaint in its final form alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees about union activity and by threatening not to reinstate employees due to their union activities; and violated Section 8(a)(3) and (1) by terminating 31 employees about January 26, 1993, and by failing to reinstate 20 of them, to discourage union activity. The complaint further alleges that between about November 30, 1992, and about January 13, 1993, a majority of Respondent's employees in an appropriate unit designated the Union as their collective-bargaining representative, and that the alleged unfair labor practices were so serious and substantial in character that the possibility of erasing their effects and of conducting a fair election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards, would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone.

The transcript of a March 10, 1993 representation case hearing in which Respondent was the employer and the Union was the petitioner was received into evidence without objection. On the basis of the record as a whole, including the demeanor of the witnesses who testified before me, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel), the Union, and Respondent[1] and the General Counsel's oral argument on the record after all parties had rested, I make the following

FINDINGS OF FACT

I. JURISDICTION AND THE UNION'S STATUS

Respondent is a corporation which manufactures confectionery products in Skokie, Illinois. At all material times, Respondent has sold and shipped from that facility, to points outside the State of Illinois products, goods, and materials valued in excess of $50,000 annually. I find that, as Respondent admits, Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

[1] After the briefs had been filed, the General Counsel filed a document captioned, ''Counsel for the General Counsel's Motion to Strike Matter from Respondent's Post-Hearing Brief.'' Respondent's response requests me to disregard this document, on the ground that it constitutes ''in part a de facto Reply Brief.'' I disagree with Respondent's characterization, and dispose of the General Counsel's motion, infra, fns. 37, 58, 61, and 64.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

At the time of the events here in question, all of Respondent's stock was owned by its president, Julius Meerbaum, who had spent at least most of his working career in the candy business.[2] In 1968, he became plant manager for a company called Leaf Confections or Leaf Candy. In 1974, he began Respondent's operations, manufacturing a product not produced by Leaf. Julius Meerbaum retired from Leaf in 1984. Leaf was a union shop, and he never had any union problems while he was the plant manager there.

Julius Meerbaum was actively involved as Respondent's principal manager, on a day-to-day basis, from its inception until about 1986, when he moved to Florida. Then, Julius' son John and Julius' son-in-law David Sabin, both of whom had been part of Respondent's management since about 1977, began to operate the business, with relatively little participation by Julius Meerbaum. This arrangement continued until the summer of 1992, when John Meerbaum (who had been involved in sales, marketing, and production) ''burned out.'' Thereafter, he confined his work to sales and marketing, and came to the plant irregularly. After John Meerbaum's burnout, Julius Meerbaum, who had become somewhat bored with retirement, increased his active participation in the management of the business, including production. He testified that he was ''probably'' Respondent's policy maker,[3] and that he consulted with Sabin and John Meerbaum in making policy decisions for Respondent. Julius Meerbaum further testified that during the latter part of 1992 (that is, after March 1992) he came to Skokie about twice a month, for 4 or 5 days each time; and that when he was in Skokie, he spent most of the time on the production floor to see how production was running and how people were working, ''I became the first supervisor.''

At the time of the events here in question, David Sabin ran the business on a day-to-day basis. Directly under him were admitted supervisors, Ignacio Alfonso Marquez (frequently referred to in the record as Al or Alphonse) and Jose Diaz. The Meerbaums, Sabin, Marquez, and Diaz comprised Respondent's entire managerial complement. Practically all of Respondent's production and maintenance employees speak Spanish as their primary or only language. Marquez and Diaz are bilingual;[4] Sabin and the Meerbaums speak no Spanish.

During a representation case hearing held on March 10, 1993 (see infra, part II,D,E), Respondent and the Union stipulated that Respondent lost about $53,000 during the year ending August 31, 1991; and made a net profit of about $10,000 during the year ending August 31, 1992. Owner Julius Meerbaum's salary during the calendar years 1991 and 1992 exceeded $100,000 annually; his gross salary during the 2-week pay period ending March 20, 1993, was about $2200. He testified at the March 1993 representation case hearing that in 1992, he spent less than 8 days a month at the plant, and that ''A lot of months, I don't come in.''

B. *The Union's Organizing Campaign*

In late November 1992, Aida Lopez, an organizer in the Union's employ, made contact with unit employee Serafin Patino. On December 1 and 12, 1992, and on January 12, 1993, the Union conducted organizing meetings, in Spanish, which were attended by employees of Respondent. During these three meetings, Lopez distributed blank cards that stated, in Spanish and in English, that the signatory authorized the Union's parent International to represent him in collective bargaining. Lopez told the employees that the cards meant that they wanted to be represented by a union. She told them that once they signed the cards, there might be an election. She further stated that all workers in the United States have the right to get organized without suffering any threats and without being fired for that desire. Lopez also stated that even though it is illegal to fire employees for organizing, some companies do this, and this company conduct is called unfair labor practices. She went on to say that sometimes it is not necessary to go to an election; that when there is a ''big breaking of the law,'' the Union has to file charges and the National Labor Relations Board (the Board) has to decide if the rights of the workers had been ''broken;'' and that it was very important that they know the card meant that they wanted to be represented by a union, because ''if there is any problem we can go for a bargaining order.''

Lopez encouraged the employees to talk to their coworkers about the Union, but did not encourage employees to talk to management or supervisors about it. During the December 12 and January 12 meetings, she passed out leaflets which, in Spanish and English, described perceived advantages of union organization and urged employees to sign union cards; this was the only literature distribution during the campaign. During these meetings, Lopez also gave blank cards to employees present, for the purpose of distributing them to other employees. Only employee Patino returned to the Union cards signed by other employees. No kinds of union insignia were distributed to employees. Employee Patino testified that he had no direct knowledge or evidence as to whether Respondent knew anything about the organizing campaign prior to January 26, 1993; and that ''I think they didn't know.''

Between December 1, 1992, and January 26, 1993, 19 of the 31 employees in the bargaining unit signed authorization cards.[5] Respondent contends that most or all of these cards should not be given operative effect, because of the signatories' alleged immigration status (see the remedy, infra). Respondent's posthearing brief, however, does not question the authenticity of any of the signatures, or question the operative effect of any of these cards on any other grounds.[6]

C. *The Allegedly Unlawful Terminations*

Sabin testified at the March 10, 1993 representation case hearing that ''over the years,'' Julius Meerbaum had been

[2] Julius Meerbaum died during an October 6–November 21, 1994, adjournment of the hearing.

[3] Sabin testified that Julius Meerbaum's job was to make company policy.

[4] Marquez testified in good English; Diaz elected to testify through a Spanish-English interpreter.

[5] One of these employees, Evelia Reyes, signed a card on the same day as, but after, her termination, which the General Counsel contends was unlawful.

[6] Thus, Respondent does not contend that the cards are inoperative as to the Union because they name only the Union's parent International. See *Jerry's United Super*, 289 NLRB 125, 145 (1988).

upset with him because Julius Meerbaum wanted fewer people working in the plant. Julius Meerbaum testified before me in July 1994 that he ''always knew'' there were too many people in the plant, including in the latter part of 1992. As discussed infra, part II,G,1, in November 1992 Respondent discontinued its second shift and terminated about 10 employees without prior notice. Thereafter, in accordance with Respondent's custom, the plant shut down for about 2 weeks during the holidays. When it reopened on January 4, 1993, three or four employees did not return to work. Diaz told Sabin that Respondent needed to hire some more employees, and Sabin gave him permission to hire three more employees.[7] Between January 4 and 18, 1993, Respondent (through Diaz) hired three employees.[8]

Sabin did not consult with Julius Meerbaum before giving Diaz permission to hire these employees. Julius Meerbaum, however, was physically present in the plant in January before January 22, probably for at least 4 days; and when he was in the plant he customarily spent most of his time on the production floor, where Diaz was the supervisor; as found infra, part II,F, before January 26 Diaz evinced knowledge of the union movement. About January 22, Julius Meerbaum (who at this time was in Florida) had a telephone conversation with Sabin. During this conversation, Sabin said that sales were low but (inferentially) did not go into the matter in depth.[9] Sabin also advised Julius Meerbaum that on December 10 Respondent had effected a $100,000 draw on Respondent's line of credit with Lake Shore Bank; in view of Sabin's testimony that this report made Julius Meerbaum ''real mad,'' I infer from the probabilities of the case that Sabin also told his father-in-law that the draw had been repaid by the end of December, that the interest cost therefor had been relatively modest, and that Respondent's present balance with Lake Shore was at its normal level (see infra, part II,G,1). Julius Meerbaum testified that during this conversation with Sabin, Julius Meerbaum told Sabin that ''we'' were losing money, and asked him what he was going to do about it, but did not give him any specific directive; and that Sabin promised that he was going to ''look in and see what he was going to do.'' Sabin testified, in effect, that during conversations with Julius Meerbaum before January 26, Meerbaum said that ''he wasn't happy with the plant. He thought there were too many people there running around. He was looking to me to come up with an answer about what to do about it.'' On Monday, January 25, 1993, Foreman Diaz told employee Patino that Respondent would have to get rid of ''some'' workers, because there was little work.

At 8 a.m. Florida time (7 a.m. Illinois time) on Tuesday, January 26, 1993,[10] Julius Meerbaum telephoned Sabin from Florida. Between that hour and 10:30 a.m. (Florida time) that morning, Meerbaum telephoned Sabin on more than one occasion, and Sabin telephoned Meerbaum on one occasion; the substance of these conversations is discussed infra, part II,G,1. During their last conversation that morning before Meerbaum left for the West Palm Beach Airport, Meerbaum told Sabin that Meerbaum had decided to terminate the employment of all the employees in the plant. While Meerbaum was driving to the West Palm Beach Airport to catch a 12:40 p.m. (Florida time) plane to Chicago, he used his car phone to tell Sabin, ''shut the place down, I am coming in.'' Sabin thereupon telephoned John Meerbaum, who was not in the plant that day, to describe Julius Meerbaum's instructions.[11] Julius Meerbaum testified that he reached this decision because he believed Respondent had too many employees in the plant to meet Respondent's production requirements and Sabin did nothing to correct the situation.

A few minutes after receiving Julius Meerbaum's telephone call from his car phone, Sabin called Foreman Diaz into the office. Sabin told Diaz and Foreman Marquez, who was also present, that Julius Meerbaum was coming to town and wanted the plant shut down. Sabin told Diaz to shut down the plant and send everyone home, that Julius Meerbaum was going to take over.[12]

At that time, the plant was solely manufacturing sugar wafers (sometimes referred to in the record as cookies), which were in various stages of being mixed, baked, coated with ''creme'' or chocolate, cut, wrapped, and packed. When Diaz received these shutdown instructions from Julius Meerbaum, he and/or Marquez, shortly before the customary 11:30 a.m. lunchbreak, told all of the production and maintenance employees to stop their machines and go home. Most of the employees were instructed to punch out immediately, but two employees stayed a little later to finish the product that was still in the machines when they were shut down. As the employees were leaving, Marquez stated in the hearing of most of them that they were being sent home because Julius Meerbaum had called and said he had no more money to pay the people.

That day, all 31 of the employees in the bargaining unit were terminated; their names are listed, infra, in Conclusions of Law 4 and 8.[13] The complaint in its final form alleges that the terminations of all 31 violated Section 8(a)(1) and

[7] This finding is based on Sabin's testimony. For demeanor reasons, I do not credit Diaz' testimony that the decision to hire more people emanated from Sabin.

[8] One of these employees was Carlos Luna, whose termination on January 26, 1993, is attacked in the complaint. Luna was initially hired by Respondent in April 1992. While still actively working for Respondent, he signed a union card on December 1, 1992. He was initially terminated on December 12, 1992, for reasons not claimed to be unlawful.

[9] This inference is based on the fact that sales were the province of John Meerbaum, who also spoke with his father a week or two earlier; on Julius Meerbaum's testimony that Sabin had previously told him that sales were down; and on the fact that Respondent did not project sales or maintain records that on their face showed up-to-date sales.

[10] All dates hereafter are 1993 unless otherwise stated.

[11] This finding is based on Sabin's testimony. Because Julius Meerbaum's instructions to shut down the plant immediately were unprecedented and were disapproved by Sabin, in view of the probabilities of the case I credit his testimony that he told John Meerbaum about these instructions, notwithstanding John Meerbaum's testimony that he had not been notified of this action in advance.

[12] My findings in the last two sentences are based on a composite of credible parts of Sabin's and Diaz' testimony. My finding that Marquez was present is based on Diaz' testimony. For demeanor reasons, I do not credit Marquez' and Sabin's denials.

[13] The complaint alleges, and the answer admits, that these 31 employees were terminated on that date. The parties stipulated that these 31 employees were employed in the appropriate unit on January 26, 1993.

(3). All of these employees except Carmen Garcia[14] were actively working in the plant at the time it was shut down. Carmen Garcia had been absent since about November 1992 because of pregnancy. Because Sabin was uncertain whether Garcia was going to return, he kept her on the payroll until the morning of January 26, 1993, when he instructed Respondent's payroll service to remove her from the payroll. There is no evidence that her termination was connected with the plant shutdown that day. The complaint as to her will be dismissed.[15]

Julius Meerbaum testified that while he was on the plane for Chicago, of which Skokie is a suburb, he decided whether or not to rehire any of the employees who had been sent home that day. When his plane landed at 2:20 p.m., Illinois time, he immediately went to the plant, which is 15 or 20 minutes from the airport. By the time he reached the plant, all of the production and maintenance employees had been sent home, although Sabin, Diaz, and Marquez were still there. Meerbaum, Sabin, and Marquez were not asked whether Meerbaum conversed that day with Diaz and/or Marquez. Diaz testified that he did not see Julius Meerbaum that day.

D. *The Filing and Receipt of the Representation Case Petition*

The Union filed a representation petition with the Board's Regional Office, seeking an election among Respondent's production employees, at 3:22 p.m. on January 26, 1993, about 4 hours after the terminations.[16] Respondent, however, did not receive a copy until February 1, 1993. Sabin testified without objection or limitation that he did not learn about the union organizing campaign until January 29, when he learned that the terminated employees' claim for unemployment compensation included the allegation that they had been terminated because of the Union. For reasons set forth infra, part II,G,1, I do not credit Sabin's testimony as to when he first learned about the organizing campaign.

E. *The Allegedly Discriminatory Failure to Recall*

Prior to January 26, 1993, Respondent had never terminated all of its production and maintenance workers at the same time. Rather, Respondent had responded to sales declines by reducing the workweek, terminating some employees, or (in November 1992) eliminating a shift pursuant to a decision by Julius Meerbaum.[17] In the past, Respondent had not followed the practice of recalling employees who had been terminated for the purpose of cutting labor costs (although see fn. 55, infra). On January 27, while Diaz was on the production floor, Julius Meerbaum instructed him to recall some of the employees who had been terminated on January 26. Diaz or Marquez thereupon telephoned most of the employees to be recalled, and told them to return to work; as to the employees who had no telephones, Diaz arranged for them to be notified by fellow employees whom he had telephoned.

Respondent does not pay employees at overtime rates until after they have worked 40 hours a week, regardless of the length of their workday. In January 1993, the plant had been operating 4 days (40 hours) a week. Diaz credibly testified before me that when the plant resumed production in February 1993, it operated 5 or 6 days (50 or 60 hours) a week. When the plant resumed production, Respondent speeded up some of the machines that it put back into operation.[18] In addition, Respondent speeded up its labeling process by beginning for the first time to label its cartons by means of a labeling machine, which Julius Meerbaum had purchased some time earlier but that had never been put into operation, rather than by hand. Julius Meerbaum testified at the March 10 representation case hearing that although he could not testify as to how much production per week or per month Respondent was then putting out, it was almost the same as it had been before the January 26 terminations. Sabin testified before me that so far as he knew, there were no orders that Respondent had received at that time that were not produced during February 1993.

Before January 26, all five of Respondent's ovens were operating. Diaz testified that before January 26, four employees were working on these ovens; Sabin testified at the representation case hearing that before January 26, five employees were working on these ovens; and Julius Meerbaum testified that before January 26, six or seven employees were working on these ovens. Diaz testified that Julius Meerbaum instructed him on January 27 to run two ovens; Julius Meerbaum testified that after January 26, Respondent operated three ovens. Diaz testified that he brought back one, or at the most two, employees to run two ovens; Julius Meerbaum testified that two people were brought back to run three ovens; and Sabin testified at the March 10 representation case hearing that two employees were running three ovens.

As to how the individuals to be recalled were selected, Diaz testified before me that Julius Meerbaum told him which machines and how many were to be operated when the plant resumed operations, told him to bring back the number (which Meerbaum did not specify) necessary to operate each of these machines, and told Diaz to bring back the employees who knew the work the best and were the most efficient; and that once Diaz received these instructions, it was he who decided how many and which people to bring back (see infra, fn. 19). On July 19, 1994, however, at the outset of the hearing before me, Respondent's counsel stated that Julius Meerbaum had decided ''by himself'' which employees would be recalled. Similarly, the posthearing brief of

[14] Respondent's payrolls include two employees with this name. Comparison of the hiring dates on the stipulated list of employees in the bargaining unit on January 26, 1993, with the hiring dates on Respondent's payroll records shows that the Carmen Garcia named in the complaint is employee number 0692.

[15] As discussed infra, part II,E, she returned to active employment in February 1993.

[16] My finding as to the date and hour is based on the parties' stipulation after inspecting the Regional Office's receipt stamp on the original petition. In assessing the credibility of Union Organizer Lopez, I have taken into account her testimony that she filed the petition about 11 o'clock that morning.

[17] Over a period of a few months in 1985, Respondent had shortened the length of the workweek, had then discontinued the third shift, had then discontinued the second shift, and had then cut down the first shift. During this period, the plant complement diminished from 85 to 17.

[18] The ovens and the wrapping machine, which had been operating at a slower pace than the manufacturer specified, were speeded up to ''specification.'' Diaz was responsible for maintaining the machines at the manufacturer's specification.

Respondent's counsel states (p. 7), ''Julius alone made the decision regarding which employees would be kept to run the plant.''[19] Moreover, Julius Meerbaum testified before me and at the representation case hearing that it was he, himself, who selected the employees who were asked to come back to work, and that he selected those who in his opinion were the most efficient (mostly, the employees with the longest period of service). Meerbaum testified at the representation case hearing that he identified these employees to Diaz on January 27 when Meerbaum saw two or three employees working to finish up what was on the floor and saw the others when they came to the plant on that day for their paychecks; according to Meerbaum, he knew some of these employees by name and recognized others by their faces. Meerbaum's testimony aside, there is no evidence that he saw any of the employees when they came back on January 27 for their paychecks. Moreover, Diaz testified that none of the employees who came to the plant that day to pick up their checks came into the production area; that he did not see any employees that day except two (Alanius and, perhaps, Sergio Roman) who worked on January 27; that Diaz did not see Julius Meerbaum that day until after the employees had been given their checks; and that Diaz was on the production floor when Julius Meerbaum told him about the people that he wanted Diaz to bring back to work. Furthermore, Sabin, who physically gave out the checks, testified that Julius Meerbaum did not give such instructions to Diaz in Sabin's presence.[20] Employee Rivera, who was hired by Respondent after Julius Meerbaum had moved to Florida and who was called back to work by Diaz and John Meerbaum effective about February 1, credibly testified that nobody else was present when Sabin gave him his check. Similarly, employee Serafino Patino testified at the March 1993 representation case hearing, in effect, that Julius Meerbaum was not present when Sabin gave Patino his check.[21] At this time, Patino, who speaks a little English, asked Sabin in English when there would be more work. Sabin replied in English that he did not know, that sales were low, and that Respondent would call Patino—who, however, was never recalled.[22]

On July 7, 1993, about 3 months after the representation case hearing and about a year prior to the unfair labor practice case hearing before me, Respondent's counsel submitted to the Board's Regional Office a statement of position that read in part as follows (emphasis in original):[23]

> On Wednesday January 27, 1993 the production employees came to the plant to pick up their last paychecks. At that time, Meerbaum stood next to the plant supervisor, Jose Diaz, and told Diaz which employees to hire back. *Diaz did not offer comments*, and instead, he simply took down the names of the people that Meerbaum wished to rehire. Employees who were not rehired at the time were not put on a preferred list. Instead, Meerbaum decided that if and when new employees were hired, he would have them trained by those employees that he had retained. The Company started operations with thirteen employees on February 2, 1993 [cf. infra, fn. 26 and attached text].
>
> In making his hiring decisions, Meerbaum relied on his own personal knowledge of the employees. Even though he did not know the [employees'] names, Meerbaum knew their faces, and he had observed them working. Based on his years of experience, Meerbaum felt he was best able to judge which employees the Company should retain. Because Meerbaum's knowledge of the employees came from Meerbaum's relatively infrequent observation of the plant, most of the employees retained were those who had been with the Company for many years. For example, Sergio Doman [presumably referring to Sergio Roman], Isaias Alavious [presumably referring to Isaias Alanius] and Teresa Cisnerous [sic] had all worked for Intersweet for approximately ten (10) years.
>
> The decisions were not, however, based strictly on seniority. Instead, Meerbaum retained employees who impressed him when he observed the plant's operations. For example, Gracielo [sic] Salgado had impressed Meerbaum with her skills as a ''packer.'' Thus even though Salgado had been with the Company for less

[19] In purported support of this claim, counsel refers to p. 189 of the transcript. At pp. 189–190, Diaz testified in part:

> Q. [By the General Counsel] . . . you picked the one person to bring back [to run the ovens]?
>
> A. Correct, yes.
>
> Q. And nobody told you which one to bring back?
>
> A. No, [Julius Meerbaum] just said to me to bring back the person who knows the most that he needs to know to work the ovens and that was the person who knew the most.
>
> . . . .
>
> Q. So Julius did give you some instructions as to which people he wanted you to bring back, is that correct?
>
> A. Not specifically no, but he said to me bring in the people who know the work the best, the most efficient and those are the ones I brought.
>
> Q. Once you had these instructions from Julius them you decided which people to bring back?
>
> A. Correct.

[20] When asked who was involved in telling the people to come back to work, Sabin testified before me, ''I think Jose [Diaz], I mean Julius told Jose who to bring back.''

[21] When he testified before me in July 1994, Patino testified that he did not remember whether any other member of management was present when he received his check from Sabin.

[22] This finding is based on Patino's testimony before me and at the representation case hearing. At the representation case hearing, Sabin testified that Patino asked when the employees would be able to come back to work but denied telling Patino that Sabin would call him back. During the hearing before me, Sabin was not asked about this conversation; in any event, he impressed me as generally a less honest witness than Patino.

[23] The quoted material is included in G.C. Exh. 17, which consists of excerpts from that position letter. The General Counsel's posthearing brief renews his hearing objection, on hearsay grounds, to the receipt of R. Exh. 13, which is the entire position letter. This latter document was offered and received to show the context of G.C. Exh. 17, and was not offered or received to establish the truth of the matter asserted. I adhere to my action at the hearing in receiving R. Exh. 13 for this limited purpose. I have based no findings on the portions of the exhibit that are not included in G.C. Exh. 17. Moreover, I perceive nothing in R. Exh. 13 that either augments or detracts from the weight properly attributable to the variation between this position statement and the testimony, much of it from Respondent's management.

than two years, Meerbaum retained her.[24] Aside from Salgado, all the employees retained had at least five years of service.[25]

Ten employees were recalled to work effective on or before February 2.[26] Of these 10, 2 (Rivera and Roman) had signed union cards. Of these 10, 9 were the senior employees on the payroll. Graciela Salgado, however, who did not sign a card, was junior to six employees (all but Francisca Gomez being card signers) who were terminated and never rehired; there is no specific probative evidence as to Respondent's reasons for retaining Salgado rather than an employee senior to her (see supra, fn. 24). Thereafter, but before the representation case hearing on March 10, Respondent rehired two more employees who had been terminated on January 26 but had not signed union cards—Antonio Vinces and Carmen Garcia; Garcia's termination was not connected with the plant shutdown (see supra, part II,C), and she had not actively worked for Respondent since taking time off (because of pregnancy) a month before the union organizing drive began. Garcia worked 40 hours during the 2-week pay period ending February 6, 1993, a period which includes the date of the January 26 terminations; Respondent's payroll records for the 2-week pay period ending March 20, 1993, state as to her, ''Hired—12/14/88, Last Raise—1/23/93.'' Blanca Ruiz, who had been absent because of pregnancy during a period which included January 26 and who never signed a union card, was returned to work on February 15.[27] Rosa Linda Ruiz, who had signed a card, was rehired on May 4, 1993, after the election eligibility date and, probably, after the Union had withdrawn its petition; the record fails to show whether she, or anyone else who had been terminated on January 26 and not recalled by March 10, affirmatively applied for a job with Respondent after being terminated. So far as the record shows, none of the 18 remaining employees who were terminated on January 26, 1993, was ever offered a job by Respondent. The names of these 18 employees are listed, infra, in Conclusion of Law 5. All of these 18 except Francisca Gomez and Roberto Marquez had signed union cards.

During the first week in February, a job applicant asked Diaz whether the employees terminated on January 26 had been fired because of the Union. Diaz replied, ''[W]hat union [?] I don't know anything about a union.''

On February 22, 1993, the Acting Regional Director issued a notice of hearing which set the representation case hearing for March 10, 1993. Toward the close of that hearing, which lasted 1 day, union counsel stated on the record that the Union ''may well not wish to proceed if the Director finds that all or most of the [unrecalled employees separated on January 26] are not eligible'' to vote. At that hearing, when Julius Meerbaum was asked whether he planned to hire any employees ''during this year,'' he replied, ''Hopefully, the business will need it. I pray for it. . . . But I certainly wouldn't need that many people to get [the current] production.'' When asked where he would get additional employees if he needed them, he testified, ''They come through the door. . . . Every day, there are people asking for jobs.'' Rather similarly, Sabin testified at the March 10 representation case hearing that Respondent obtains new employees from people who ''walk in the door.'' Several days before March 11, however, Julius Meerbaum (the only member of management who was able to speak Polish) decided that Respondent needed more people and should advertise therefor in the *Polish Daily News*, a Polish-language newspaper.[28] When asked why help wanted advertisements were put in a Polish-language newspaper, John Meerbaum replied that Marquez and Diaz had told him that no applicants had come in, and that a Polish newspaper was chosen ''Because the Mexican people just wanted to come to the door. We had Polish people before.''[29] John Meerbaum placed Respondent's order for this help-wanted advertisement on March 11, the day after the representation case hearing; the order stated that the advertisement was to run between March 15 and 19, inclusive. The advertisement was printed in the Polish language.[30] A Polish applicant (Andrzej Rosinski) started to work for Respondent on March 17, and another (Jaroslaw Dombrowski) started on March 18. They worked for Respondent for 4 and 3 days, respectively; Diaz (who testified through a Spanish-English interpreter) testified that the Polish applicants ''spoke a little bit of English or they would bring someone who spoke English to fill out the application and I was there with them.'' Between March 17 and 19, 11 employees of Mexican descent, who had never before worked for Respondent, started to work there. Julius Meerbaum testified that the hiring between March 17 and 19 brought Respondent's complement back up near the number that Respondent had had on January 26.

On March 22, 1993, the Regional Director issued her Decision and Direction of Election in the production and maintenance unit that is described, infra, in Conclusion of Law 3, and to whose appropriateness the parties stipulated before

[24] This document, prepared by company counsel, contains the only record evidence as to why Salgado was retained. Julius Meerbaum was not asked about her.

[25] The employees recalled effective on or before February 2, 1993, included Adam Martinez (hired in June 1988); Ismael Moran (hired in Oct. 1988); and Fermin Rivera (hired in June 1988). The employees rehired thereafter included Rosa Linda Ruiz (hired in 1992, rehired in May 1993). Antonio Vinces, who was rehired before March 10, 1993, had been most recently hired in 1992, but had previously worked for Respondent for a total of about 9 years.

[26] Isaias Alanius, Teresa Cisneros, Antonia Delgado, Adam Martinez, Ismael Moran, Fermin Rivera, Sergio Roman, Graciela Salgado, Flavio Vasquez, and Bobby L. Watkins.

[27] On February 9 or 10, Sabin inserted on his worksheet the notation ''terminated'' after the names of each of the employees listed in Conclusion of Law 5, plus Vinces and Rosa Linda Ruiz. Jt. Exh. 1 in the representation case record shows that Vinces was rehired before March 10. Respondent's payroll record for March 20, 1993, which is based on information given by Sabin to the payroll service no later than about March 23, states as to Vinces, ''Hired 8/17/92, Last Raise 1/26/93.''

[28] My finding that these decisions were made by Julius Meerbaum is based on Sabin's testimony. Although in November 1994 John Meerbaum testified as a witness for Respondent that the decision to hire and to advertise was made by him, as an adverse witness called by the General Counsel he testified in July 1994 that he had no role in hiring new employees, or in how many or whom to hire.

[29] On April 15, 1993, however, a help-wanted advertisement by Respondent was run in a Spanish-language newspaper.

[30] John Meerbaum testified that he did not recall whether he asked the newspaper to translate the advertisement, whose wording he gave to the newspaper in English, into Polish. The newspaper contains classified advertisements in English as well as Polish.

me and at the representation case hearing. The Regional Director there found that the employees who had been laid off in January 1993 and had not been rehired thereafter were not eligible to vote, on the ground that they did not possess a reasonable expectancy of recall. The Direction of Election was issued on a printed form that included a statement that unit employees who were employed during the payroll period immediately preceding the date of the decision—that is, during the payroll period ending March 20—were eligible to vote. The Board's Rules afforded the Union 14 days to request a Board review of this Direction of Election (Sec. 102.67(b)). So far as the instant record shows, no such request was ever filed.

Between March 26 and April 12, inclusive, 1993, Respondent hired 15 new production employees, each at the Fair Labor Standards Act statutory minimum of $4.25 an hour. At least when first employed, most of them worked substantial amounts of overtime.[31] About April 13, 1993, Respondent placed a help wanted advertisement to run on April 16 in La Raza, a Spanish-language newspaper. Between April 14 and 16, inclusive, Respondent hired three more employees, all of whom likely came from Mexico.[32] As of April 17, Respondent's production and maintenance complement consisted of about 37 employees. The Union withdrew its representation petition on a date not shown by the instant record and, on June 9, 1993, filed its initial charge herein.

F. *The Alleged Independent Violations of Section 8(a)(1)*

The complaint alleges that on various occasions between about January 1993 and about March 1993, Respondent violated Section 8(a)(1) of the Act through statements allegedly made by admitted Supervisor Diaz. As a witness for Respondent, Diaz denied most of these statements. As noted infra, each of the two witnesses who attributed these alleged statements to Diaz testified that some of them were made in the presence of admitted Supervisor Marquez, who at the time of the hearing was still working for Respondent as a supervisor but was not directly asked about these alleged statements (see infra, fn. 46).[33]

At the time Diaz testified, he had a substantial motive to testify favorably to Respondent. Diaz had been working for Respondent for 14 or 15 years, the last 4 of them as a supervisor, and was one of the highest paid individuals on Respondent's payroll even though his primary language is Spanish and he elected to testify through a Spanish-English interpreter.[34]

On the other hand, some of the alleged unlawful statements by Diaz were testified to by a witness, employee Sergio Roman, who also evinced strong motives for testifying as favorably as possible to Respondent. When Roman testified on October 5, 1994, he was one of the at most two card signers on Respondent's current payroll who had been working for Respondent on January 26, 1993, the day of the allegedly unlawful termination of the entire work force.[35] He failed to comply with a served subpoena that called for his appearance in July 1994,[36] although he was working at Respondent's plant on that date; and initially failed to appear before me pursuant to an order by the United States District Court requiring him to appear at 9:30 a.m. on October 5, 1994.[37] In May 1993, Roman had expressed reluctance to give an affidavit to Board Agent William Belkov, on the ground that Roman did not want to lose his job; at that time, Belkov had told him that he had a right to give an affidavit and not be afraid, that Respondent could not hold it against him under the law and could not take any action against him under the law for doing so, and that if Respondent did this it would be a violation of the Act. The statements that this affidavit and Roman's testimony attributed to Diaz, if in fact made, implied that Respondent had terminated all of the employees (including Roman) on January 26, 1993, because of the Union, and represented that because of the Union Respondent would not take back the employees who (unlike him) had not been rehired thereafter. Roman testified in the afternoon of October 5, 1994, that he had failed to appear that morning, as required by the District Court's order, because of fear; and he evasively testified that he did not know why he was afraid. His demeanor when testifying showed that he was little short of panic-stricken. I infer that his fear of testifying was mostly, if indeed not entirely, due to fear that Respondent would terminate him if it was displeased with his testimony, or if Respondent learned from his testimony that he had made statements to NLRB agents that displeased Respondent.[38] In attacking Roman's credibility, Re-

[31] Both of the brand new employees who were hired on Friday, March 26, worked 18 hours of overtime during the 2-week pay period that began on Sunday, March 21, and ended on Saturday, April 3. Of the 9 brand new employees who were hired between April 5 and 12, 1993, all but two (Eulalia Carreto and Aracelli Perez) worked overtime during the 2-week pay period that ended on April 17, the amounts ranging between 10 hours (Julia Ortega) and 34 hours (Ozuma Belen).

[32] Six employees were terminated between April 3 and 17.

[33] Marquez was called by the General Counsel as an adverse witness under the Fed.R.Evid. 611(c). Respondent's counsel neither asked Marquez any questions at that time, nor called him as a witness.

[34] Diaz' gross pay for 1992, including a May 1992 raise, exceeded $48,000. His gross pay for that year exceeded that of everyone else on the payroll except Julius Meerbaum and Sabin. Diaz' hourly rate in 1993 was the same as in 1992 after the May 1992 raise.

[35] The other, if any, was Rosa Linda Ruiz. The record fails to show whether she was still in Respondent's employ as of October 1994.

[36] For this reason, the hearing stood in recess between July 22 and October 5, 1994.

[37] On that date, Roman had reported for work at Respondent's plant in Skokie, Illinois. Later that morning, he agreed to come to the hearing room in downtown Chicago, Illinois, if someone would pick him up. This errand was jointly performed by representatives of Respondent and the Union, and at 1:30 p.m. he did in fact show up and testify.

Respondent's response to the General Counsel's motion to strike portions of Respondent's posthearing brief accepts the representation in that motion that on that date, the General Counsel spoke to Roman on only one occasion. Accordingly, I perceive no reason to grant the General Counsel's motion to strike Respondent's assertion, in its January 1995 brief, that on October 5, 1994, the General Counsel had ''repeated phone conversations'' with Roman.

[38] I attribute to this fear his obviously untruthful statements, toward the beginning of his testimony, that after the January 26 termi-

Continued

spondent points to portions of his testimony in which he at least allegedly overstated the number of employees who worked on wrapping machines, the number of wrapping machines in operation, and his ability to observe employees who work on other machines. Also, Respondent contends that his credibility is impeached because his testimony allegedly exaggerates his responsibility in connection with other employees. However, such at least alleged deficiencies in his testimony suggest (at most) unwarranted self-importance, or deficiencies in recollection or in ability to describe events accurately, and do not evince any tendency to invent incidents out of whole cloth. Moreover, nothing in the record suggests that Roman misunderstood, or failed accurately to remember, conversations in Spanish between Marquez and Diaz, or between Diaz and himself. Rather, Respondent chose not to ask Marquez about the matter, and relies solely on blanket denials by Diaz that the conversations testified to by Roman occurred at all.

Accordingly, although Roman stands to receive a few days' backpay if the General Counsel fully prevails, and although there is some evidence that he thinks Respondent is underpaying him,[39] to the extent that his testimony obviously served to assist the Union, I find such testimony to have been wholly honest. Further, although much of his testimony was given after he was read (through a Spanish-English interpreter) his prehearing affidavit to refresh his recollection,[40] and some of this testimony merely consisted of reaffirming portions of his affidavit after they had been read to him, I infer that he required prompting out of fear rather than out of an uncertain recollection.

The other witness who testified to Diaz' alleged unlawful statements was Fermin Rivera, who was angry at the Company because he believed his April 1993 discharge, for reasons not claimed to violate the Act, to be unjust.[41] In addition, he stands to gain several days' backpay should the General Counsel prevail in his claim that the January 1993 terminations were unlawful. Moreover, although Rivera himself did insert his name in the blank calling for the employee's signature on a union card,[42] his testimony that he himself also made other entries on his card, that he signed it on January 10 (a Sunday), and that the January 10 date was written by Patino, is refuted by the fact that all of the other entries are made in a different colored ink and in a different hand from his ''signature,'' by Patino's credible testimony that Rivera returned the card to Patino on a weekday a day or so before the union meeting at Wendy's (held on January 12) with only Rivera's ''signature'' on it, and by Lopez' credible testimony that she inserted the remaining entries on the card (Rivera's name in the space calling for the employee's printed signature, his address, and the erroneous January 10 date).[43] However, some of Rivera's testimony as to Diaz' remarks is indirectly corroborated by Roman, who attributed rather similar remarks to Diaz on other occasions. Moreover, as previously noted, Respondent did not ask Supervisor Marquez about certain remarks that (according to Rivera) were made by Diaz in Marquez' presence.

For the foregoing reasons and after considering the witnesses' demeanor, and notwithstanding Diaz' denials, I find as follows:

1. I credit the following testimony by Rivera: After he signed his union card about January 11, 1993,[44] and before the January 26 shutdown,[45] when he and Diaz were on the production line, Diaz asked him if he knew about the Union, to which Rivera untruthfully replied no.

In view of this conduct by Diaz before the January 26 shutdown, as shown by the credited testimony, I do not credit Diaz' testimony that he did not learn about the Union's organizing drive until after January 26.

2. Rivera testified on cross-examination that after he returned to work following the terminations, he asked Diaz why he did not bring back the old people instead of hiring new ones from outside, and that Diaz replied that people were never going to come back because of the Union (see p. 293, LL. 18; p. 296, LL. 3; p. 305, LL. 10–12). As to this alleged conversation, Diaz' entire testimony was as follows:

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nations he never saw any of the terminated employees back at work. Although I do not question the accuracy of the rather sketchy account in Respondent's brief (p. 33 fn. 30) about the assurances that I requested Respondent to give Roman, the conversations thus referred to occurred off the record.

[39] In April 1993, a month before Roman signed his affidavit for the Board, he had told Diaz that Roman would move from Chicago to Oregon unless Diaz gave him a raise, which Roman did not receive.

[40] The affidavit is in English and was translated for him into Spanish before he signed it. Roman speaks little or no English.

[41] He never filed a charge based on this discharge. The case number on his prehearing affidavit, which he executed before the Union filed the charge underlying the instant case, shows that this affidavit was given in connection with an earlier unfair labor practice charge as to which the identity of the Charging Party, and the ultimate disposition, are not shown by the record. Although he never told the Union about Diaz' alleged unlawful statements until after being discharged, Rivera's sole prior contact with the Union had been the execution of a union card in Respondent's parking lot at the behest of fellow employee Patino, from whom Rivera obtained the telephone number of Union Organizer Lopez after being discharged.

[42] He printed his name, in accordance with his custom in executing documents. His printed ''signature'' also appears on his prehearing affidavit.

[43] Respondent challenges Rivera's credibility partly on the ground that on cross-examination he gave the ''inherently improbable'' testimony that, out of the 12 employees who were working in February 1993, 3 (including himself) were full-time forklift (jeep) drivers. However, on redirect he testified that all three of them also performed other work.

[44] This date is shown by Patino's testimony that it was signed about a day before the union meeting at Wendy's, and by Lopez' testimony that this meeting was held on January 12. A Board date-stamp on the card shows that the Board received it on January 23.

[45] Rivera initially testified that on direct examination that this conversation occurred ''A week after, when I came back, when I came back to work.'' When he so testified, both company counsel and I inferred that Rivera was referring to his return to work in February 1993, after the January 26 termination of the entire unit. However, such testimony is equally susceptible to the inference that Rivera was referring to his return to work on January 4, 1993, following the customary 2-week plant shutdown during the holidays. Moreover, after the General Counsel showed Rivera his prehearing affidavit to refresh his recollection, which affidavit dates this conversation as having occurred ''[s]ometime before the employees were terminated in January, 1993,'' he testified that the conversation occurred before the January 26 shutdown. When asked on cross-examination why he was now sure that the conversation occurred before the January 26 shutdown, he testified that when Diaz asked him this question, the employees who were permanently terminated with the January 26 shutdown were working in their areas.

Q. [By Respondent's counsel] Mr. Rivera states that he said to you that you should bring in some of the old people to help him train the people who were working there and didn't know. He says your response was, ''No, because they were with their damn union.''

A. No.

Q. Did this conversation occur?

A. No, sir.

If the foregoing testimony constituted all the record testimony as to this incident, I would feel virtually compelled to credit Rivera, because the conversation denied by Diaz was not the conversation as it was described by Rivera on cross-examination. Moreover, Respondent's brief (pp. 28–29) states that Rivera's request to Diaz as described by Rivera on cross-examination was ''entirely different'' from Rivera's request as described by him on direct examination and as included in company counsel's description to Diaz of Rivera's testimony—namely, that Diaz ''should bring in some of the old people, the old employees to help me to train the people who were there and who didn't know.'' I credit Diaz' testimony to the extent that he denied the direct testimony of Rivera described in the preceding sentence. However, Diaz did not deny that Rivera asked him why he did not hire the old employees instead of the new ones, nor did Diaz testify about his response to this question. Accordingly, I credit the testimony by Rivera on cross-examination as summarized in the first sentence of this paragraph. From the content of this conversation, I infer that it took place after Respondent began to hire brand new employees, action which (Respondent's record show) began on March 17.

3. I credit the following testimony by Rivera: After Respondent began to hire new employees (action that began in mid-March, according to Respondent's payroll records), he heard a conversation between Marquez and Diaz during which Marquez told Diaz that it would be a good idea to bring in some of the old employees to help train the new employees; to which Diaz replied, ''[N]o, they were not coming back here to work because they were in the Union.''[46] At this time, Marquez and Diaz were facing Rivera, and in a position where they could see him.

Respondent contends that this conversation could not have taken place, on the ground that allegedly there is no area in the plant that answers Rivera's description of the area where this conversation took place, nor any table in the plant which answers his description of the table at which the two supervisors were sitting at that time. Rivera testified that he heard this conversation where he was not near any machinery or equipment and he had stopped his forklift in order to unload cookies which ''we would carry . . . bring'' to the cutting machine, the machines ''were a little bit further away''; I see nothing in this testimony that is inconsistent with Diaz' testimony that there is no area in the plant where cookies are cut but where there is no machinery or equipment. Rivera further testified that during the conversation, the two supervisors were sitting at a table that was 25 to 50 feet from the nearest piece of machinery and whose dimensions were about 4 by 6 feet; as to the function of this table, he described it as ''where you put things like labels, or boxes, or you make boxes. It is not a table for production. It is a table where you would put things like boxes.'' The tables described by Diaz as near to the machinery are smaller (3-1/2 by 4 feet) than the table described by Rivera; Diaz' testimony about the production process is in no way inconsistent with Rivera's testimony that the boxes were put on the larger table after they had been filled with wrapped cookies and sealed; and the representation case record shows that until February 1993, labels had been hand placed on the boxes. Accordingly, and for demeanor reasons, I do not accept Diaz' testimony that during the period where this conversation occurred, the plant did not contain any tables in a location like that described by Rivera.

4. I credit the following testimony by Roman: After the newly hired Mexicans had been working at the plant for a little while (Respondent's records show that these new hires began work about March 17), their perceived mistakes led Roman to tell Diaz that they did not know how to work, and that Diaz should call back the old employees who did not work there any more, to which Diaz replied, ''That they weren't going to call them back again because of the Union.''

Moreover, in view of the credible testimony regarding Diaz' remarks to Marquez, and for demeanor reasons, I do not credit Diaz' testimony that he was never told that he could not rehire any of those people that were terminated on January 26, 1993.

In addition, I credit the following testimony by Sergio Roman: Two or three weeks after the January 26 shutdown, as he was approaching a point where Diaz was conversing with Marquez, Roman heard Diaz tell Marquez in Spanish that the employees were all ''pendejos'' (a word that the interpreter of Roman's Spanish-language testimony stated could signify either ''idiots'' or ''mean people'') because Respondent knew everything about who was involved with the Union. After Diaz and Marquez had separated, Roman approached Diaz; asked him why Respondent had terminated employees; and said that that was ''not fair.'' Diaz replied (in the presence of employee Rivera, who had come into the area) that ''the Union wasn't good for the Company, it wouldn't benefit them.''[47] The complaint does not allege that these remarks by Diaz to Roman violated the Act.

[46] Rivera initially testified that this conversation occurred about a week after his return to work following the mass termination; his prehearing affidavit dates this conversation as a week or two after his return. However, both his testimony and his affidavit attach this conversation to a day after Respondent started hiring people, activity that (Respondent's records show) began in mid-March. Accordingly, I conclude that the Diaz–Marquez conversation occurred in mid-March. As an adverse witness for the General Counsel, Marquez reluctantly testified that he learned about the Union a ''Couple of weeks maybe, a couple of days [after the January 26 terminations]. I can't remember exactly when they mentioned [or] where it was that I heard about it,'' but that he talked to Diaz about the Union or Diaz told him about it. Marquez went on to testify that he never ''really'' talked to Diaz about why the old employees were not brought back. This testimony aside, Marquez was not asked about this conversation. To the extent that such testimony by Marquez may constitute a denial, for demeanor reasons I credit Rivera.

[47] Rivera was not asked about this conversation. However, Roman attached Rivera's presence to a remark by Diaz that would have little significance to someone who did not hear the question that prompted it.

G. *Analysis and Conclusions*

1. The allegedly unlawful terminations and failure to reinstate

The evidence that I have credited up to this point shows as follows: In late November 1992, Respondent's employees began to engage in a union organizing campaign during which, by January 26, 1993, 19 of Respondent's 31 employees in an appropriate unit signed cards authorizing the Union to represent them. Within the 2-week period before January 26, Foreman Diaz asked employee Rivera if he knew about the Union, to which Rivera replied no even though he had signed a union card. Although management testified that Julius Meerbaum had been saying (during a period of years which included 1992) that Respondent was overstaffed, between January 4 and 18, 1993, Respondent hired three new employees. On Tuesday, January 26, Respondent's owner, Julius Meerbaum, telephoned his son-in-law Sabin, who was Respondent's top-ranking day-to-day manager, at 7 a.m. Sabin's time. After a series of telephone conversations between the two men that morning, Meerbaum used his car phone, en route to the Palm Beach Airport to catch a 12:40 p.m. (Florida time) plane to Chicago, to instruct Sabin to shutdown the plant at once. Sabin thereupon relayed these instructions to Supervisors Diaz and Marquez, who complied even though this required the shutdown of machines a few minutes before the lunchbreak while they were in the process of mixing, baking, and packing Respondent's wafers. About February 1, Respondent resumed operations with only 10 of the 30 employees who had been separated in midproduction just before lunch on January 26, but with a workweek increased by 25 to 50 percent at overtime rates. Later that same week, Respondent added to its active work force an 11th employee (Carmen Garcia) who because of pregnancy had not actively worked for Respondent since before the union drive began, and who had not signed a union card. About a week later, Respondent added to its active work force a 12th employee (Blanca Ruiz) who because of pregnancy had not been actively working for Respondent, and who had not signed a union card. Of the 10 recalled employees who had been separated in connection with the plant shutdown, 2 had signed union cards; of the 20 who were not recalled by February 2, 16 had signed union cards; of the 2 rehired thereafter, 1 had signed a union card.[48] About mid-February, Foreman Diaz told Foreman Marquez that Respondent knew everything about who was involved with the Union; and upon Roman's inquiry about why the employees had been terminated, at least implied that this action had been taken because of the Union (''the Union wasn't good for the Company, it wouldn't benefit them'').

About 2 days before the March 10 representation case hearing, Julius Meerbaum decided to place a help-wanted advertisement in a Polish-language newspaper, although he was the only member of Respondent's management who spoke Polish, lived about 1200 miles from Respondent's plant, and was present at the plant on only a part-time basis. At that representation case hearing, Respondent contended that the unrecalled separated employees were ineligible to vote because Respondent's alleged plan not to hire any more employees (together with other evidence) meant that the unrecalled employees had no reasonable expectation of future employment. Also at that hearing, the Union stated that if Respondent's contention in this respect was accepted in the Regional Director's Decision and Direction of Election, the Union might withdraw its petition. Within a week after the representation case hearing, Respondent began to hire new employees (one or two of whom may have been unable to speak any language other than Polish); about 11 of these new hires occurred before the eligibility date specified in the Regional Director's March 22 Direction of Election. After the Regional Director found ineligible the unrecalled employees who had been separated on January 26, the Union did indeed withdraw its petition.

After Respondent began to hire new employees, Foreman Marquez suggested to Foreman Diaz that some of the old employees be brought back to help train the new employees, to which Diaz replied no, they were not coming back because they were in the Union. In addition, when employees Roman and Rivera suggested that the old employees should be called back to work, Diaz replied that because of the Union, this would not be done. Such explanations by Diaz constituted ''an outright confession of unlawful discrimination [, which] eliminated any question concerning . . . other causes suggested'' (*L'Eggs Products v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980)). Between March 17 and April 16, 1993, Respondent hired 31 unit employees who had never worked for it before. Of the 30 employees separated in connection with the plant shutdown on January 26, 1993, 18 were never recalled or rehired; these unrecalled 18 included all but 3 of the card signers, and only 2 employees (Gomez and Roberto Marquez) who had not signed a card.

The foregoing evidence shows, prima facie, that Respondent's action in failing to recall 18 of the employees separated on January 26 was motivated, at least in part, by a desire to keep Respondent's plant nonunion. Other record evidence lends support to this conclusion. Thus, members of Respondent's management gave mutually inconsistent testimony about who selected the individual employees to recall: Diaz testified before me that it was he who made this selection, whereas Julius Meerbaum and Sabin testified before me and at the representation case hearing that this selection was made by Julius Meerbaum. Moreover, the record is inconsistent with the July 1993 representations of Respondent's counsel (whose opening statement, in July 1994, claimed that the selection was made by Julius Meerbaum) as to the mechanics of his alleged selection process. Consistent with Julius Meerbaum's testimony at the representation case hearing that he did not know the names of many of the employees although he knew their faces, counsel represented in July 1993 that when the employees came to the plant on January 27 to pick up their ''last'' paychecks,[49] Meerbaum stood next to Diaz and told him which employees to hire back. However, not only did Julius Meerbaum fail to give any testimony to this effect, but Diaz testified that on January 27, he did not see any of the employees (except the two who were working

[48] ''The Board and the courts have long recognized that a disproportion in the percentage of layoff as between union adherents and others is persuasive evidence of discrimination.'' *San Angelo Packing Co.*, 163 NLRB 842, 846 (1967), citing cases. See also *Hurst Performance, Inc.*, 242 NLRB 121, 128 (1979).

[49] Actually, their paychecks for the pay period that had ended during the week preceding the terminations.

in the plant that day), and did not see Julius Meerbaum until after the terminated employees had come to pick up their checks. Furthermore, Sabin, who physically gave out the checks on January 27, testified that he was not present at any time when he heard Julius Meerbaum tell Diaz which of the terminated employees to rehire. Also, two of the employees—one who was rehired and one who was not—credibly testified without specific contradiction that Julius Meerbaum was not present when these employees received their checks from Sabin. These inconsistencies and gaps in Respondent's versions of who made the selection and how it was made suggest that the selection was made on the basis of unlawful considerations. Further doubt on Respondent's honesty of purpose in selecting the number and identity of the employees to be recalled in early February 1993 is cast by the mutual inconsistencies between the testimony of Julius Meerbaum, Sabin, and Diaz about the number of employees brought back to operate the ovens, the number of ovens operated after they were brought back, and the number of employees who worked on the ovens before the terminations (see supra, part II,E). Moreover, because Diaz was physically present in the plant on a full-time basis whereas Julius Meerbaum was present on only a part-time basis, because the probative evidence fails to show how Julius Meerbaum (who admittedly did not know all the employees' names) could have had the opportunity on January 27 to advise Diaz whom to recall, and for demeanor reasons, I credit Diaz' testimony that it was he who made the selection, and do not credit the testimony of Sabin and Julius Meerbaum otherwise.

Further supporting the conclusion that the failure to recall these 18 employees was motivated by a desire to keep the Union out is the inconsistency between Respondent's representation case testimony as to its hiring plans and Respondent's actual conduct both before and after that hearing: although Julius Meerbaum and Sabin gave representation case testimony supporting Respondent's claim that the unrecalled (and overwhelmingly prounion) employees were ineligible to vote because Respondent's alleged plans not to hire any more employees (together with other evidence) meant that the separated employees had no reasonable expectancy of recall,[50] prior to the March 10 representation case hearing Julius Meerbaum had decided that Respondent needed more people and should advertise therefor in the Polish Daily News; this advertisement was placed on March 11 to run between March 15 and 19. Although Respondent contends (Br. 9) that hiring was begun in mid-March because of Respondent's decision to manufacture a new product (Krunchkies, a confection consisting of Rice Krispies mixed with marshmallows), John Meerbaum testified that Respondent did not begin Krunchkie shipments until ''probably July''; that Krunchkies were shipped within 2 weeks after manufacture; that Respondent did not start full production of Krunchkies until June or July; that Krunchkies are not made without an order therefor; that ''[t]he finished product when we had the packaging and everything ready to go was probably in June''; that in May, Respondent was working on ''the art work, the engravings, cylinders, [and] packaging material''; that it was May when Respondent sent out samples, told its marketing representatives that the product was coming, and asked them to solicit orders therefor; that Respondent sold no Krunchkies at all in May; that the manufacture (although not the packaging) of Krunchkies required machines entirely different from those used to manufacture Respondent's current product of sugar wafers; that Respondent did not start making Krunchkies at all until around the end of March or early April; and that new employees could be trained for Krunchkie production within 5 or 10 minutes. Further, although John Meerbaum testified before me in 1994 that the decision was made about March 7, 1993, to run a help-wanted advertisement because Diaz and Marquez had told him that no applicants were coming in,[51] Julius Meerbaum testified at the representation case hearing on March 10, 1993, with some corroboration from Sabin, that when Respondent did resume hiring, Respondent would get additional employees by means of applicants who ''come through the door. . . . Every day, there are people asking for jobs;'' and between March 17 and 19, 1993, 11 employees of Mexican descent, who had never before worked for Respondent, started to work there, inferentially as ''drop-ins.''[52] Moreover, Respondent's conduct in connection with its Polish Daily News help-wanted advertising is difficult to square with any contention that Respondent had selected that newspaper for a legitimate business reason rather than to obtain new employees who for language reasons could not be solicited for the Union by incumbent union employees or by the union organizers who were then in charge of the drive at Respondent's plant: Polish was not spoken by any member of management who was at the plant on a day-to-day basis or even (so far as the record shows) by anyone currently employed at the plant before the Polish Daily News advertisements; and whether or not John Meerbaum anticipated when ordering the advertisements that they would be printed in Polish, there is no evidence that management sought to have them changed to English during the 5-day period when they ran, even though (according to Diaz) some of the Polish applicants knew so little English that they brought in someone who spoke English to fill out their job applications.[53]

When (as here) the General Counsel has shown by a preponderance of the evidence that the employer's personnel action was motivated in some part by its desire to impede protected activities, the employer can avoid being adjudicated a violator of the Act only if it can prove by a preponderance of the evidence that its actions were based on legitimate reasons which, standing alone, would have induced the employer to take the same personnel action. *NLRB v. Advance*

[50] At the representation case hearing, Julius Meerbaum testified, in effect, that Respondent did not have any even tentative plans to hire any more employees. Sabin testified at that hearing that he did not know whether Respondent might have to hire some more people in the next month or two; and that ''At this moment,'' he had no expectation of recalling any of the people whom Respondent had let go in January.

[51] John Meerbaum testified at this point that it was he who made this decision; I have previously found that this decision was made by Julius Meerbaum (supra, fn. 28 and attached text).

[52] I so infer because Respondent's only pending help-wanted advertisement was printed in Polish in a Polish-language newspaper.

[53] Because Respondent's rehiring practices after February 2, 1993, constitute evidence of its unlawful motivation in shutting down the plant on January 26 and selecting whom to rehire prior to February 2, I see no merit in Respondent's contention that such practices must be disregarded because the complaint alleges an unlawful failure to reinstate employees ''About February 2, 1993,'' and the charge alleges an unlawful failure to rehire ''On or about January 26, 1993.''

Transportation Co., 979 F.2d 569, 574 (7th Cir. 1992); *Peter Vitalie Co*., 310 NLRB 865, 871 (1993). As to Respondent's failure to recall 18 of the employees separated on January 26, Respondent has failed to discharge its burden of proof.

Thus, the record shows that upon resuming production on February 2, Respondent increased the length of its workweek by 25 to 50 percent (from 40 hours to 50 or 60 hours), although all of the increased hours had to be paid at time and a half. Moreover, the record is wholly silent as to the total number of hours worked by Respondent's employees during any pay period between the February 6 end of the 2-week pay period that included the period of the plant shutdown, and the 2-week pay period that ended on March 20, 1993, during which February 6–March 20 period the number of employees rose to approximately its level just before the January 26 terminations. This void is not filled by the evidence that Respondent's sales were lower in January 1993 than in December 1992, were lower in February 1993 than in January 1993, and were higher in March 1993 than in January 1993 (although lower than in December 1992). As to the level of the employee complement, these sales figures could have significance only on the assumption that Respondent adjusted that complement in relatively quick response to fluctuations in the level of orders. However, both Julius Meerbaum and Sabin testified that Respondent does not keep records that at any point before the end of the month total sales or orders so far that month, or show whether the current month has so far been good or bad; and that Respondent does not project sales.[54]

Moreover, the evidence shows that Respondent decided several days before March 11, 1993 (in other words, about the first week in March), that it needed more employees, and between March 17 and 19 Respondent hired 13 employees who had never worked for Respondent before. Respondent's conduct in this respect is not explained by Julius Meerbaum's testimony that the employees who were not recalled in early February were never rehired because they were inefficient. Diaz testified that he was never told not to rehire them and he did in fact rehire two of them; moreover, even accepting Julius Meerbaum's testimony (which I do not accept; see infra) that Respondent had decided on January 26 that it had been overstaffed and should rehire only the most efficient employees among those in its January 26 work force, such testimony does not supply a reasonable basis for inferring that he honestly believed the rest of the employees to be so inefficient that brand new employees would likely be more efficient than any of the old ones. Nor is Respondent's action in hiring brand new employees explained by the evidence that before 1993, Respondent had not followed the practice of recalling employees terminated for economic reasons but, instead, had usually increased the size of its work force by adding applicants.[55] Respondent did recall a number (overwhelmingly nonunion) of the employees who had been terminated on January 26; indeed, Sabin had promised Patino that he would be recalled when orders picked up (although he never was recalled). The fact that the 12 recalled or rehired employees included 3 card signers (Roman and Rivera, recalled by February 1; and Rosa Linda Ruiz, rehired in May) does not call for the conclusion that Respondent's failure to recall the remaining 18 (including 16 card-signers) was lawfully motivated; a discriminatory motive, otherwise established, is not disproved by an employer's proof that he did not take similar action against all union adherents. *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964); and *Resolute Realty Management Corp*., 297 NLRB 679, 689 (1990). For all that appears, Rivera and Roman may have been recalled because Respondent believed Rivera's untruthful claim to Diaz that Rivera knew nothing about the Union, and because Respondent either regarded Roman's services to be particularly valuable or mistakenly believed he had not signed a card;[56] moreover, Ruiz was not rehired until after the eligibility date in the Direction of Election and, perhaps, after the Union withdrew its petition.

For the foregoing reasons, I conclude that Respondent failed to recall the 18 employees listed in Conclusion of Law 5, infra, to discourage union activity, in violation of Section 8(a)(3) and (1) of the Act. My conclusion in this respect leads me to the further conclusion that this was likewise Respondent's motive, at least in part, in terminating them, and 12 other employees who were in fact recalled, on January 26, 1993. More specifically, Julius Meerbaum testified, in effect, that he decided on the January 26 terminations as a preliminary step in determining whether to rehire the terminated employees and, if any were to be rehired, how many and whom. From this testimony, Diaz' conduct in at least implying to employee Roman that the terminations were motivated by the Union's organizing drive, and the eventual discriminatorily based selection of employees for recall, I conclude that Meerbaum's decision to initially terminate all 30 was motivated at least in part by a desire to gain time in which to

[54] On March 10, 1993, Julius Meerbaum testified at the representation case hearing that Respondent was then producing at almost the same level as it had been producing before January 26. However, he testified that he did not know how much per week or per month the current production was. Moreover, as previously noted, a few days before so testifying he had decided to hire more employees.

[55] Sabin testified before me in October 1994 that Respondent had not called back to work any of the 10 employees who lost their jobs when the second shift was shut down in November 1992, but that he could not recall whether any of them had been rehired. At the March 1993 representation case hearing, Filiberto Varela, whose January 1993 termination is attacked in the instant complaint, testified that he had been laid off in November 1992, and had been recalled about December 8, 1992, by means of a telephone call from Marquez, who was not asked about this matter. Varela further testified at that hearing that four other employees, whom he did not name, were laid off and brought back at the same time he was. Moreover, at that hearing employees Bonifacia Brito and Martha Haro, whose January 1993 terminations are likewise attacked in the complaint, testified that they had been laid off in November 1991, and recalled 2 weeks later by Diaz, who was not asked about this matter. Further, at that hearing employee Serafin Patino (whose January 1993 termination is also attacked in the complaint) testified that on an undisclosed date after June 1989, he had been laid off because a machine broke down, and recalled after it was repaired. As to Varela, Brito, Haro, and Patino, their dates of hire as reflected in Respondent's payroll records precede the beginning of the layoff periods described in this footnote. Also, as discussed supra at fn. 8, Respondent rehired employee Luna in January 1993 after having terminated him in December 1992.

[56] Neither Rivera nor Roman attended any union meetings. As of February 1993, only one other unit employee (Vasquez) was paid as much as Roman. Vasquez and Roman were the senior employees in the unit. Foreman Diaz testimonially described Roman as an employee who was experienced in his job and whom Diaz trusted a lot because Roman always knew what he was doing.

decide which employees to keep or get rid of in order to keep the Union out while still operating the business. This conclusion is further supported by the fact that Respondent had never before responded to drops in sales by terminating its entire work force;[57] by the fact that the employees were sent home a few minutes before the usual lunchbreak and without having completed the production of the wafers that were already in Respondent's machines in various stages of being mixed, baked, cut, coated, and wrapped; and by the evidence that Respondent had added to its production force as recently as 8 days previously even though management testified to statements by Julius Meerbaum over a period of years, including the latter part of 1992, that Respondent was overstaffed. The unlawful motive for the terminations is further indicated by various peculiarities in the evidence relating to Julius Meerbaum's explanations therefor. Thus, although his testimony and Respondent's statement of position attribute the terminations partly to a drop in sales, Respondent's records did not include an up-to-date showing of whether sales had in fact dropped. Further, although Julius Meerbaum testified that ''the main thing that triggered me off'' on January 26 was that Sabin had told him about January 22, 1993, that Sabin had borrowed ''more'' money from Lake Shore (more specifically, that on December 10, 1992, he had used $100,000 of Respondent's $250,000 line of credit from Lake Shore),[58] Respondent's July 1993 statement of position referred to this December 1992 transaction only by way of background and stated that as of July 1993 Respondent had used half of its $250,000 line of credit; between September 30, 1992, and December 10, 1992, Respondent owed nothing to Lake Shore; the balance outstanding after the December 10 transaction had been repaid by the end of December 1992; Respondent's interest costs with respect to this December 1992 draw had been lower than for any of the seven other draws since March 1992, and were less than a third of the interest costs for a draw effected in September 1992; Respondent's current checking account balance (as of January 21, 1993) was $15,000 and the end-of-month balance was $32,000;[59] and Respondent had used between $30,000 and $50,000 of its line of credit on five previous occasions since September 1991.[60] Particularly in view of the evidence noted in this paragraph, Respondent has failed to discharge its burden of showing, in response to the General Counsel's evidence establishing that the terminations were at least in part unlawfully motivated, that they would have been effected even in the absence of Respondent's desire to keep the Union out of the plant.[61]

For the foregoing reasons, I find that Respondent also violated Section 8(a)(3) and (1) by terminating all of the actively employed unit members (listed in Conclusion of Law 4, infra) on January 26, 1993. Such a mass termination for the purpose of discouraging union activity violates Section 8(a)(3) and (1) of the Act whether or not the employer was aware of the union sympathies of particular employees. *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1168–1169 (D.C. Cir. 1993), cert. denied 114 S.Ct. 1368 (1994); *Guille Steel Products Co., Inc*., 303 NLRB 537, 537 (first fn. 1) (1991); *ACTIV Industries*, 277 NLRB 356 fn. 3 (1985). ''A power display in the form of a mass lay-off, where it is demonstrated that a significant motive and a desired effect were to 'discourage membership in any labor organization,' satis-

[57] Respondent's sales had dropped by 15 percent in October 1992 over the preceding month, and had dropped by 47 percent in November 1992 over October. However, in November 1992 Julius Meerbaum merely decided to terminate about 10 employees.

[58] On an undisclosed date in January 1993, Lake Shore discontinued Respondent's credit line; the probative evidence at least arguably shows that at about this same time, Lake Shore refused to lend Respondent an undisclosed amount of money. The General Counsel's motion to strike that portion of Respondent's brief that attributes this action to Lake Shore's alleged belief that Respondent had little work to do is denied, on the ground that Respondent is thereby requesting me to draw an inference from the record evidence. I note, however, that upon the General Counsel's hearsay objection, and without awaiting any ruling thereon by me, Respondent's counsel withdrew the question of what reason for such action was given by Lake Shore to witness John Meerbaum. (Cf. Fed.R.Evid. 803 (3).) No Lake Shore representative was called as a witness.

[59] Between July 30, 1991, and March 31, 1993, Respondent's end-of-month balance averaged about $25,000.

[60] On the same day that Respondent used $100,000 of its line of credit, Respondent wrote a check for $110,000. The record fails to show the payee of this check, or why it was written. This was the largest check written by Respondent between July 1991 and February 1993. The second largest check was for about $32,000, in November 1992. Most of the checks written by Respondent during this period were for sums of less than $1000.

My findings as to Respondent's bank transactions are based on statements that had been sent to Respondent by Lake Shore, and which the General Counsel obtained by a subpoena directed to Lake Shore after a subpoena therefor directed to Respondent had resulted in the production of only a portion of this material with the representation that Respondent could not find the rest among its own records. The General Counsel disavows any contention that Respondent intentionally withheld records from ''discovery'' by the General Counsel (Br. 16, fn. 13). However, the General Counsel does request me to infer, from Respondent's failure to offer its ''financial records,'' that they would not have supported its contention that the bank loan was a factor in its personnel decisions. I decline any invitation to draw any inference, other than those called for by the bank statements themselves, from the fact that they were obtained and offered into evidence by a party other than the party to which the statements were more accessible. As to ''financial statements'' other than the bank statements, the General Counsel has not specified what they are, or why they would likely constitute evidence as to whether there was a relationship between the terminations and the bank loan.

[61] The General Counsel has moved to strike fn. 44 of Respondent's posthearing brief, on the ground that although the General Counsel subpoenaed Respondent's 1991–1992 bank records from Respondent, and eventually obtained them from the bank by subpoena after Respondent was unable to find most of them, fn. 44 allegedly claims that the General Counsel had failed to seek most of these bank records. The motion is denied, in view of Respondent's representation that fn. 44 was directed to the General Counsel's failure ''to ask questions of Respondent's witnesses pertaining to the circumstances surrounding the loans set forth in'' the loan statements. However, Respondent's contention in this respect overlooks the fact that because the General Counsel has preponderantly shown that Respondent's personnel action was partly motivated by the employees' union activity, a statutory violation has been made out unless Respondent preponderantly shown that its actions were based on legitimate reasons which, standing above, would have caused it to take the same personnel action (*Advance Transportation*, supra, 970 F.2d at 574; *Peter Vitalie*, supra, 310 NLRB at 871). In other words, the burden rested on Respondent (not the General Counsel) to adduce evidence (in any event, most accessible to Respondent) regarding the circumstances, on which Respondent relies, surrounding the loan.

fies the requirements of 8(a)(3) to the letter even if some white sheep suffer along with the black.'' *Majestic Molded Products v. NLRB*, 336 F.2d 603, 606 (2d Cir. 1964). As to Respondent's knowledge of the union movement at the time of the unlawful terminations, I note that Julius Meerbaum did not deny that he possessed such knowledge at the time he decided to terminate the entire production work force;[62] that Diaz' interrogation of Rivera before the January 26 terminations shows that Diaz knew about the union movement; that Diaz had substantial contact with Julius Meerbaum when he visited the plant; and that he visited the plant in January (inferentially, no earlier than it reopened on January 4 following the holiday shutdown) and before January 22. Further, in view of Julius Meerbaum's testimony that on January 26 he told Sabin that if he could not make a decision, Julius Meerbaum would come and make the decision, and because the decision which Julius Meerbaum did come and make was a decision to terminate all the unit employees in preparation for resuming operations with a smaller work force containing only a small minority of union supporters, I infer from the probabilities of the case that Julius Meerbaum referred to the union movement during this conversation with Sabin; accordingly, I do not credit Sabin's testimony that he did not learn about the union movement until several days after the terminations. Indeed, Diaz' day-to-day contacts with Sabin, Diaz' immediate superior, suggest that prior to January 26, Diaz alerted Sabin to the existence of the union movement.

2. The alleged independent violations of Section 8(a)(1)

I find that Respondent violated Section 8(a)(1) when Supervisor Diaz told Supervisor Marquez, in the visible presence of employee Rivera, that the old employees were not coming back to work because they were in the Union; and when Diaz told employees Roman and Rivera that the older employees would not be called back because of the Union. *Grinnell Fire Protection Systems*, 307 NLRB 1452, 1454 (1992); *United Beef Co.*, 277 NLRB 1014, 1029 (1985); *Horton Automatics*, 289 NLRB 405, 407 (1988), enfd. 884 F.2d 574 (5th Cir. 1989).

In addition, I find that Respondent violated Section 8(a)(1) when Supervisor Diaz asked employee Rivera if he knew about the Union. In finding that this question violated the Act, I note that Rivera gave an untruthful reply; that he never (so far as the record shows) revealed to management his support of the Union; that Diaz did not (so far as the record shows) give Rivera any assurance against reprisals; that no legitimate reason for this question was given to Rivera by Diaz or appears in the record; that Respondent used its information about the union movement to terminate all the unit employees and recall mostly employees who had not signed union cards (although Respondent did recall Rivera after his untruthful disclaimer); and that although Diaz was Rivera's immediate supervisor, Rivera could not have been interrogated about the Union by top management who were regularly present at the plant, because they do not speak or understand Spanish and there is no evidence that Rivera, who testified through an interpreter, has any appreciable knowledge of English. See *NLRB v. Berger Transfer & Storage*, 678 F.2d 679, 689–690 (7th Cir. 1982); *Basin Frozen Foods*, 307 NLRB 1406, 1415 (par. VIII,C) (1992).

[62] Julius Meerbaum's death before the close of the hearing does not vitiate his failure to disclaim knowledge. As of October 6, 1994, Respondent's counsel expected that John Meerbaum would be Respondent's last witness during Respondent's case in chief. John Meerbaum became ill during the lunchbreak that day, and arrangements were made that day to resume on October 20. Julius Meerbaum suffered a stroke on October 6 in Florida, by reason of which I issued an order on October 14 postponing resumption of the hearing, and he died before the hearing resumed on November 21. John Meerbaum was the last witness to testify.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its facility currently located at 7321 Ridgeway Avenue, Skokie, Illinois, but excluding all professional employees, supervisors, office clerical employees and guards as defined in the Act.

4. Respondent has violated Section 8(a)(1) and (3) of the Act by terminating the following employees on January 26, 1993:

Isaias Alanius	Ismael Moran
Bonifacia Brito	Serafin Patino
Teresa Cisneros	Dolores Perez
Antonia Delgado	Antonio Rebollar
Manuel Esteban	Evelia Reyes
Hilda Garcia	Fermin Rivera
Francisca Gomez	Sergio Roman
Martha Haro	Rosa Linda Ruiz
Carlos Luna	Graciela Salgado
Olga Marin	Joel Soto
Roberto Marquez	Ismael Urias
Adam Martinez	Filiberto Varela
Ernesto Martinez	Flavio Vasquez
Evelia Martinez	Antonio Vinces
Sandra Montoya	Bobby L. Watkins

5. Respondent has violated Section 8(a)(1) and (3) of the Act by failing to rehire or recall the following employees:

Bonifacia Brito	Evelia Martinez
Manuel Esteban	Sandra Montoya
Hilda Garcia	Serafin Patino
Francisca Gomez	Dolores Perez
Martha Haro	Antonio Rebollar
Carlos Luna	Evelia Reyes
Olga Marin	Joel Soto
Roberto Marquez	Ismael Urias
Ernesto Martinez	Filiberto Varela

6. Respondent has violated Section 8(a)(1) of the Act by (a) telling employees Roman and Rivera that the old employees were not going to be called back, because of the Union; (b) stating in the visible presence of employee Fermin Rivera that the old employees were not coming back to work be-

cause they were in the Union; and (c) asking employee Fermin Rivera if he knew about the Union.

7. The unfair labor practices described in Conclusions of Law 4, 5, and 6 affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has not violated the Act by terminating Carmen Garcia.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom, and from like or related conduct.

Respondent contends that no reinstatement or backpay order should issue as to any of the employees who were never recalled. In connection with this contention, Respondent's January 1995 posthearing brief states (p. 66), ''At the outset of the hearing, Respondent made an offer of proof that it could establish that all of the employees who had signed cards were illegal aliens. It was not allowed to present this evidence. Had the Company known that these workers were unlawfully admitted to the United States it never would have hired them.'' Respondent's description of its offer of proof is inaccurate. More specifically, Respondent has never offered to prove that all of the card-signers were ''illegal aliens,'' or, for that matter, that any of them was ''unlawfully admitted to the United States.'' Rather, at the outset of the hearing, on July 19, 1994, Respondent offered to prove that ''Each of the alleged discriminatees,'' if asked as to his or her lawful entitlement to employment in the United States, ''would respond that he or she *is not* lawfully entitled to employment in the United States and/or would not be able to provide documentation or evidence that he or she *is eligible* for employment'' (emphasis supplied). Moreover, after it was pointed out to Respondent's counsel that Respondent had rehired a number of such alleged discriminatees, counsel modified his offer of proof to exclude two alleged discriminatees (Rosa Linda Ruiz and Antonio Vinces) identified in Respondent's answer as having been recalled, and the 12 alleged discriminatees whose recall the General Counsel in effect conceded by failing to name them in the complaint allegation of unlawful failure to recall; 2 of these 12 (Blanca Ruiz and Carmen Garcia) were absent at the time of the mass termination because of pregnancy, and returned to work thereafter (see supra part II,C & E).[63] To the extent that Respondent's offer of proof at the hearing, in its final form, was made in an effort to support Respondent's contention that certain employees should not be included in any order calling for reinstatement and/or backpay, I adhere to my action at the hearing in rejecting that offer.[64] Any evidence that bears on this issue may be presented by Respondent at the compliance stage of these proceedings. *Liston Aluminum*, 296 NLRB 1181, 1203–1204 (1989); *Impact Industries*, 285 NLRB 5 fn. 2 (1987), enfd. in relevant part 847 F.2d 379 (7th Cir. 1988); *Rainbow Garment Contracting Co*., 314 NLRB 929 fn. 1 (1994).[65]

Accordingly, Respondent will be required to offer reinstatement to the 18 employees listed in Conclusion of Law 5, except that reinstatement will not be required as to any discriminatee who is shown not to be legally entitled to work in the United States (*Rainbow Garment*, supra at 929 fn. 1). Also, Respondent will be required to make all the discriminatees whole for any loss of pay they may have suffered by reason of the discrimination against them, to be calculated in the manner called for by *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as called for by *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

By way of remedy, the General Counsel also seeks a bargaining order. The parties stipulated, in effect, that as of January 26, 1993, the unit consisted of no more than the 31 employees named in Conclusions of Law 4 and 8 supra (see infra fn. 67). Of these 31, 19 had signed union cards by the end of that day.[66] Respondent contends that if it had been permitted to put in evidence as to employees' status under the immigration laws, such evidence would require the exclusion of enough card-signers from the bargaining unit to establish that the Union never represented a majority.[67] However, the Board has held that in the context of a representation election, undocumented workers are to be included in the unit and are eligible to vote. *Liston Aluminum*, supra at 1181 fn. 4, 1203.[68] I see no reason to distinguish between undocumented employees' right to vote in a representation election and the operative effect of their authorization cards as a basis for a bargaining order. In any event, Respondent's

[63] Blanca Ruiz was eventually amended out of the complaint.

[64] However, I hereby deny the General Counsel's motion to strike those portions of Respondent's brief that overlap Respondent's contentions before and at the hearing regarding the significance of the employees' immigration status. Respondent's right to urge such contentions is in no way diminished by my initial rejection thereof.

[65] Unlike Respondent, I do not read *Hoffman Plastic Compounds*, 314 NLRB 683 (1994), cited in Respondent's brief (p. 71), as constituting a holding by the Board ''that back pay and reinstatement were unavailable to an employee who remained an illegal alien subsequent to the back pay hearing.'' Id. at 683 fn. 2, 685–686.

[66] Namely, Bonifacia Brito, Manuel Esteban, Hilda Garcia, Martha Haro, Carlos Luna, Olga Marin, Ernesto Martinez, Evelia Martinez, Sandra Montoya, Serafin Patino, Dolores Perez, Antonio Rebollar, Evelia Reyes (see fn. 5 supra), Fermin Rivera, Sergio Roman, Rosa Linda Ruiz, Joel Soto, Ismael Urias, and Filiberto Varela.

[67] The other parties do not appear to contend that Respondent's contention in this respect is barred by the stipulation, which I read as stating that the listed employees were in the unit laying to one side their status under the immigration laws.

[68] The election in *Liston* was held after the effective date of the Immigration Reform and Control Act of 1986, which for the first time made it unlawful for employers to knowingly employ undocumented workers. Respondent's posthearing brief correctly points out (p. 67 fn. 70) that in *Liston*, the administrative law judge found that the employees in question, who were on the pouring crew, ''were not shown to be undocumented workers . . . whose status . . . disqualified them from voting . . . There is no claim that even if these employees were later determined to be illegal immigrants, such a finding affected their employee status and rendered them ineligible to vote'' (296 NLRB at 1203). However, particularly because the Board added, to the group thus found eligible, an additional pouring-crew employee whom the judge had inadvertently failed to name, I think it highly unlikely that the Board would have failed to discuss, or even to reserve the question of, voting eligibility of ''illegal immigrants'' if the Board had been uncertain about their right to vote. Before the effective date of the IRCA, it was held that aliens unlawfully residing in the United States were eligible to vote in Board elections. See *NLRB v. Sure-Tan, Inc*., 583 F.2d 355, 358–360 (7th Cir. 1978); *Buckhorn, Inc*., 266 NLRB 968, 969 fn. 3 (1983).

offer of proof at the July 1994 hearing said nothing about the employees' legal right to be employed in the United States in January 1993 or at any other time before July 1994, and even Respondent's January 1995 brief does not claim that after the card-signers were hired, they never acquired that legal right on even a temporary basis.

As Respondent does not appear to dispute, the absence of an 8(a)(5) violation does not render a bargaining order inappropriate as a remedy for Respondent's violations of Section 8(a)(1) and (3). *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614–615, 620 (1969); *Benjamin Coal Co*., 294 NLRB 572, 572, 609 fn. 107 (1989). As the Supreme Court said in *Gissel*, supra, 395 U.S. at 613–615 (citations and quotation marks omitted):

> [I]n exceptional cases marked by outrageous and pervasive unfair labor practices [, a bargaining] order would be an appropriate remedy for those practices . . . if they are of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had . . . .
>
> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority status and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate . . . where [as in the instant case] there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

See also, *America's Best Quality Coatings Corp. v. NLRB*, 44 F.3d 516 (7th Cir. 1995); *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 439–441 (7th Cir. 1993); *Yerger Trucking*, 307 NLRB 567, 567 fn. 3, 577 (1992); *Vernon Devices, Inc*., 215 NLRB 475 (1974); *Cardinal Industries*, 315 NLRB 1303 (1995).

In the instant case, a few hours before the Union filed its representation petition, the employees' union activity caused Respondent abruptly to terminate all the active employees in the bargaining unit, in midproduction and without even waiting for the lunchbreak. The remarks of at least some of these employees to the unemployment compensation board show their awareness that their termination was caused by union activity, and Foreman Diaz later virtually admitted this motivation to employee Roman. Between the January 26 shutdown and, the payroll period ending February 20, Respondent rehired only 10 of the 30 unit employees who had been terminated in connection with the shutdown, but did rehire two employees who because of childbearing had not been actively working for Respondent. Thereafter, in the spring of 1993, Respondent advised employees Roman and Fermin, the only 2 card-signers among these 12, that because of the Union, the remaining unrecalled employees (by this time, 18 or 19) would never be recalled; as discussed supra part II,F, when Roman testified before me in October 1994 he was terrified that his testimony would cause his termination by Respondent. When choosing to add to its work force in March 1993, Respondent did not attempt to get in touch with the unrecalled workers, although in February 1993 Foreman Diaz had delivered recall messages by telephone or word of mouth; and although, on the day before Respondent's Polish-language help wanted advertisements were to begin, Respondent's management attended a Board representation case hearing also attended by several of the unrecalled terminated employees and by an attorney for the Union which almost all of the terminated employees had authorized to represent them. Instead, Respondent attempted to make sure that the unrecalled employees (most or all of whom spoke Spanish as their primary language) would not learn about these vacancies, by using help-wanted advertisements in Polish, a language not spoke by any members of management who were present in the plant on a day-to-day basis. Moreover, 3 days after John Meerbaum had arranged for these advertisements in accordance with Julius Meerbaum's instructions, Julius Meerbaum and Sabin forestalled job applications from the unrecalled employees by untruthfully testifying—at a Board representation case hearing attended by at least four unrecalled card-signers (Patino, Haro, Varela, and Brito) and union counsel—that Respondent had no immediate plans to increase its work force. Finally, at the hearing before me Respondent's counsel contended that the unrecalled employees' alleged immigration status precludes a Board order requiring their reinstatement.

Particularly in view of Respondent's statements to incumbent employee Roman implying that because of the Union the employees had been discharged in January and averring that because of the Union no more would be rehired, Respondent's thus-motivated action in effecting mass terminations and in failing to recall most of the terminated employees constituted a powerful message to all the employees in the unit (a small unit of mostly employees who had limited or no ability to speak English, and were working in unskilled jobs at the minimum wage) that union activity may well cause them to lose their jobs. ''The likely result of such action was to reinforce the employees' fear that they would lose employment if they persisted in union activity.'' *America's Best Quality Coatings Corp*., 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995). I regard such a ''hallmark'' violation (*Eddyleon Chocolate Co.*, 301 NLRB 887, 891 (1991)) as constituting ''Category I . . . outrageous unfair labor practices'' (*Tirapelli Ford*, supra, 987 F.2d at 440) whose coercive effects cannot be eliminated by the application of traditional remedies such as a cease-and-desist order and a reinstatement order which (Respondent contends) will not lead to the reinstatement of any of the 18 employees who were unlawfully not recalled. At the very least, Respondent's mass terminations, its failure to recall a group which included most of the card-signers and more than half

of the January 1993 unit, and its action in filling their jobs with brand new employees most of whom were hired before the eligibility date of the election directed by the Regional Director, constituted ''Category II [conduct] that, while less outrageous, erode[s] majority strength or adversely affect [s] the election process'' (*Tirapelli Ford*, supra, 987 F.2d at 440). These unfair labor practices caused all the employees in the unit to lose several days of work, caused most of them to lose their jobs, and caused the Union to withdraw its January 1993 election petition. Although the Union obtained its majority status more than 2 years before the issuance of this decision,[69] at the time of the hearing Respondent's unit employees included card-signer Roman, who was among the employees terminated in January 1993, was frightened by Respondent's unfair labor practices, and is in a very good position to describe them to his fellow employees in Respondent's present work force. See *NLRB v. Q-1 Motor Express, Inc*., 25 F.3d 473, 481–482 (7th Cir. 1994). While the death of Julius Meerbaum (the likely instigator of the mass discrimination) may diminish the likelihood that Respondent will continue to engage in unfair labor practices, I conclude that ''[t]he damage [has] been done'' (*Gissel*, supra, 395 U.S. at 612). In any event, current management still includes Sabin, Diaz, and John Meerbaum, all of whom assisted Julius Meerbaum in cleansing the work force of most of the card-signers; indeed, there is no reason to believe that Julius Meerbaum's role in Respondent's unfair labor practices was even known to many of the employees, whose sole contacts in connection with Respondent's unlawful acts were with the still-incumbent members of management.

The employee turnover allegations on which Respondent bases its contention that a bargaining order is inappropriate are either immaterial or unsupported by the record.[70] Thus, Respondent is in no position to rely on turnover within the vacancies created by Respondent's discriminatory termination of the 18 discriminatees who have never been recalled or (so far as the record shows) offered recall. See *Justak Brothers & Co*., 253 NLRB 1054, 1069 (1981), enfd. 664 F.2d 1074 (7th Cir. 1981); *Action Auto Stores*, 298 NLRB 875, 876 (1990), enfd. 951 F.2d 349 (6th Cir. 1991); *Yerger Trucking*, supra, 307 NLRB 567 fn. 3. Further, so far as the record shows, as of the November 1994 close of the hearing all of the employees (except Rivera) who had been recalled in early February 1993 were in Respondent's employ, either continuously since February 1993 or after one or more intervening gaps in employment (see supra fn. 70).[71] I conclude that the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies is slight at best, and that the employees' sentiment once expressed through cards would be better protected by a bargaining order than by ''traditional'' remedies alone.

In addition, Respondent will be required to post appropriate notices in Spanish (the first language of most of the employees) as well as English.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[72]

ORDER

The Respondent, Intersweet, Inc., Skokie, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating, failing to rehire or recall, or otherwise discriminating against any employee, with regard to his hire or tenure of employment or any other term or condition of employment, to discourage membership in International Ladies' Garment Workers' Union Local 76, AFL–CIO, or any other labor organization.

(b) Telling employees that old employees will not be called back because of the Union or because they were in the Union.

(c) Asking employees about union activity in a manner constituting interference, restraint, or coercion.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[69] This interval included a 3-month postponement of the hearing because of an eye injury suffered by Respondent's counsel; an 11-week postponement of the resumed hearing in order to obtain District Court enforcement of a Board subpoena directed to employee Sergio Roman, who had failed to comply therewith; and a 6-week postponement of the resumed hearing because of John Meerbaum's sudden illness and the ultimately fatal stroke suffered by Julius Meerbaum. Also, after having been given for the purpose of filing a posthearing brief the longest time (35 days from the close of the hearing) which I am permitted to afford under Board Rules (see Sec. 102.42 of the Rules and Regulations), Respondent's counsel requested and received an additional 30 days from the chief administrative law judge.

[70] As to turnover after March 20, 1993, Respondent's posthearing brief relies almost entirely on July 1994 testimony by Sabin that consisted of his reading into the record as to the calendar years 1992 and 1993, from a document that was Respondent's master list of employees and was marked for identification as R. Exh. 2, the number of people (but not their names) who were actively on the payroll during the calendar year, the number of people (but not their names) who were terminated at the end of the calendar year, and the number of people (but not their names) who were actually on the payroll at the end of the period. When Respondent's counsel moved for admission of this document, union counsel objected on the ground that he wished to review the accuracy of the summation read into the record by Sabin and to ascertain its relevance. As to relevance, Respondent's counsel then stated that he was seeking to negate the General Counsel's contention that in terminating the entire unit on January 26, 1993, Respondent took action unlike what it had ever taken before. I expressed doubt as to the relevance of the document for that purpose, on the ground that the document failed to show whether the terminated employees had quit, been laid off, or been discharged. At this point, Respondent's counsel withdrew his offer of the document; it was never reoffered, and union counsel has never had occasion to review the accuracy of the summation.

[71] Accordingly, I need not and do not discuss any possible disagreement, as to the relevance of demonstrated turnover in vacancies not created by unlawful discharges, between the Board and the Court of Appeals for the Seventh Circuit, within whose jurisdiction the instant events took place. See *Justak*, supra, 253 NLRB at 1086; *Highland Plastics*, 256 NLRB 146, 147 (1981); *Impact Industries*, 293 NLRB 794 (1989); *Action Auto Stores*, supra, 298 NLRB 875 (1990); *Ford Motor Co*., 230 NLRB 716, 717–718 (1977), enfd. 571 F.2d 993, 996–997 (7th Cir. 1978), affd. 441 U.S. 448 (1979).

[72] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Recognize and, on request, bargain in good faith with International Ladies' Garment Workers' Union Local 76, AFL–CIO, as the bargaining agent for the employees in the bargaining unit described below, and embody in a written contract any agreement reached. The appropriate bargaining unit is:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its facility currently located at 7321 Ridgeway Avenue, Skokie, Illinois; but excluding all professional employees, supervisors, office clerical employees, and guards as defined in the Act.

(b) Offer the following employees immediate and full reinstatement in the positions from which they were terminated on January 26, 1993, or, if any of their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges:

Bonifacia Brito	Evelia Martinez
Manuel Esteban	Sandra Montoya
Hilda Garcia	Serafin Patino
Francisca Gomez	Dolores Perez
Martha Haro	Antonio Rebollar
Carlos Luna	Evelia Reyes
Olga Marin	Joel Soto
Roberto Marquez	Ismael Urias
Ernesto Martinez	Filiberto Varela

(c) Make such employees, and the employees named below, whole for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in the remedy section of this decision:

Isaias Alanius	Sergio Roman
Teresa Cisneros	Rosa Linda Ruiz
Antonia Delgado	Graciela Salgado
Adam Martinez	Flavio Vasquez
Ismael Moran	Antonio Vinces
Fermin Rivera	Bobby L. Watkins

(d) Remove from its files any reference to the unlawful terminations, and notify the unlawfully terminated employees in writing, in each such employee's primary language, that this has been done and that the unlawful terminations will not be used as a basis for future personnel action against them.

(e) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary or useful for analyzing the amount of backpay due under the terms of this Order.

(f) Post at its Skokie, Illinois facility copies of the attached notice, in English and Spanish, marked ''Appendix.''[73] Copies of the notice on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that these notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

The complaint is dismissed with respect to Carmen Garcia.

[73] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''